Supreme Court, U.S.
FILED
JAN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE LAVAY CORPORATION AND
GERARD M. LAVAY,
Petitioners,

v.

DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION
AND WILLIAM J. DORN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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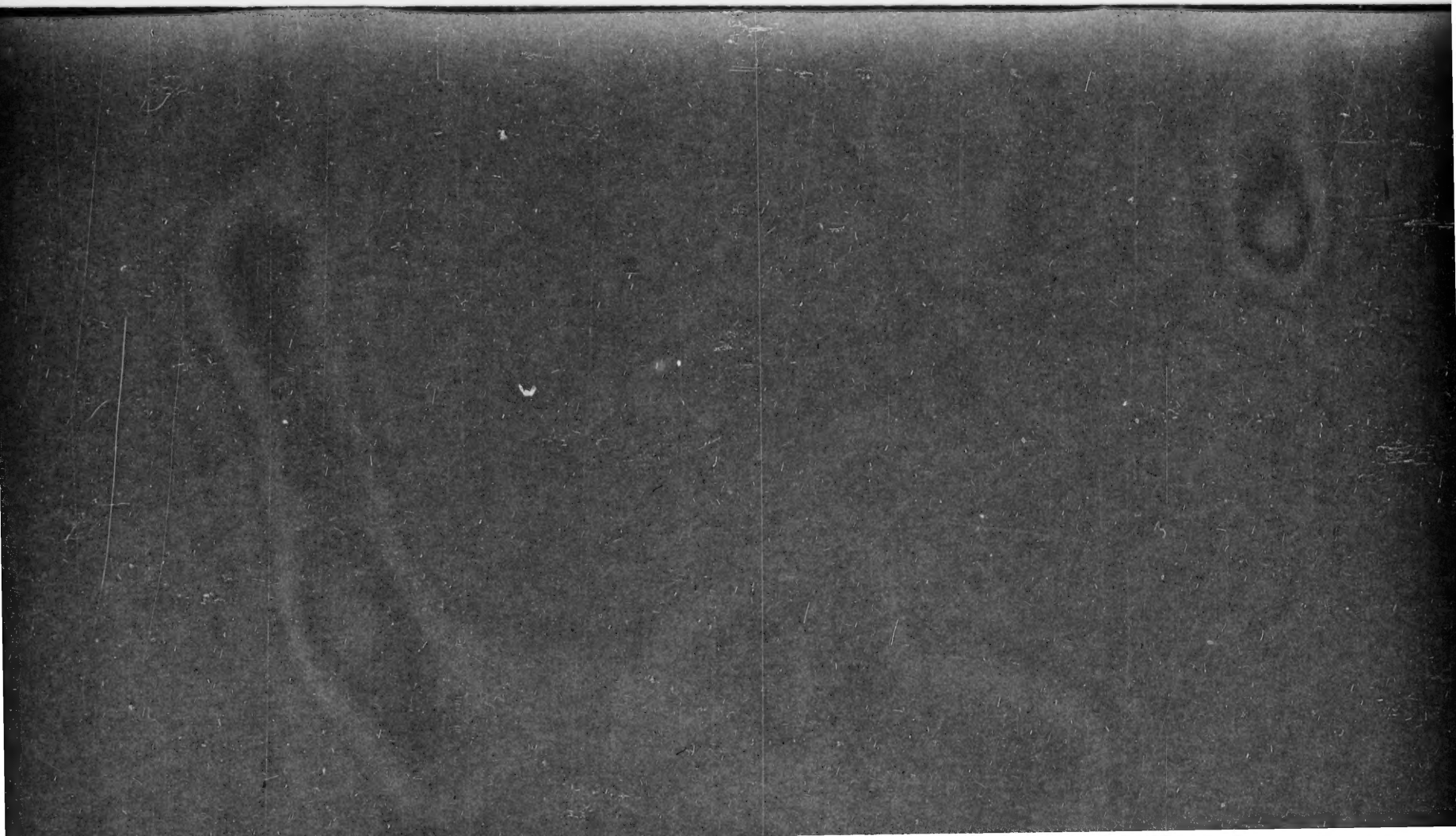
January 27, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001



QUESTIONS PRESENTED

1. Should the Supreme Court either determine which statute of limitations is applicable under Virginia law to the petitioners' common law claims of constructive fraud and breach of fiduciary duty or certify those questions to the Virginia Supreme Court? *

2. Did the United States Court of Appeals for the Fourth Circuit err when, based on principles of *res judicata*, it affirmed the dismissal by the United States District Court for the Eastern District of Virginia of the petitioners' claims made pursuant to the Racketeer Influenced and Corrupt Organizations Act?

3. Did the district court err when it applied the substantive law of the transferee forum following a transfer predicated on improper venue?

4. Should *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), which holds that a litigant in federal court cannot appeal from a remittitur order which he has accepted, be reversed?

5. Should the court of appeals be directed to reconsider its decision because it did not address one of the petitioners' arguments where this claim was not raised in the petitioners' Petition For Rehearing And Suggestion For Rehearing Before The Court In Banc? **

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* Pursuant to Supreme Court Rule 28.1, respondent Dominion Federal Savings and Loan Association states that it has no parent companies, affiliates or subsidiaries, other than wholly-owned subsidiaries.

** The additional question of sanctions raised in the petition has been resolved since its filing and is no longer an issue to be addressed.

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BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

Petitioners Gerard LaVay and The LaVay Corporation are real estate developers. Respondent Dominion Federal Savings and Loan Association ("Dominion Federal") is a federally chartered savings and loan association located in Virginia. Respondent William J. Dorn ("Dorn") is a Virginia attorney who has represented Dominion Federal in a variety of matters, including the transaction underlying this case.

In 1983, The LaVay Corporation applied to Dominion Federal for a multi-million dollar loan to be used to acquire land in Florida and then to build a mobile home retirement community to be called "The Savannah Club." The parties negotiated for several months in 1983 concerning the loan, but those negotiations broke down in the fall of that year. Dorn represented Dominion Federal during the latter stages of the negotiations. No loan was ever extended, and this suit followed.

On September 13, 1985, The LaVay Corporation and Gerard LaVay filed their complaint in the United States District Court for the District of Maryland against Dominion Federal, Dorn, and three of Dominion Federal's officers, William L. Walde, David A. Neal and James Winston Bray. All of the defendants were sued under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, *et seq.* Dominion Federal was also sued for breach of contract, breach of fiduciary duty, fraud, constructive fraud and tortious interference with contract. Dorn was sued for breach of fiduciary duty and tortious interference with contract, in addition to the RICO Act claim. The other defendants, who are not respondents in this Court, were sued for tortious interference with contract, also in addition to the RICO Act claims asserted against them.

After the complaint was served, the defendants moved to have the action dismissed because of improper venue and lack of personal jurisdiction or, in the alternative, transferred to the United States District Court for the Eastern District of Virginia, Alexandria Division. The petitioners did not oppose the motion but instead stipulated to the transfer.

The RICO Act claims were dismissed before trial on motion of the defendants because a pattern of racketeering activity, required by that Act, had not been properly alleged. The trial began on June 30, 1986. At the beginning of the trial, the district court granted a motion

in limine filed by the respondents. The court ruled that Virginia law applied to the issue of damages and that it precluded recovery by The LaVay Corporation and Gerard LaVay of profits allegedly lost when The Savannah Club was not developed by them.

At the close of the plaintiffs' case, the district court granted a directed verdict in favor of Dorn on all claims. The district court also granted a directed verdict in favor of all defendants on the interference with contract claim. This ruling had the effect of dismissing the other individual defendants, Messrs. Walde, Neal and Bray, from the case because no claims remained against them.

The remaining claims of The LaVay Corporation and Gerard LaVay against Dominion Federal were decided by the jury. The jury returned verdicts in favor of Dominion Federal on the breach of contract and fraud claims. The jury returned a verdict in favor of The LaVay Corporation on the constructive fraud claim, awarding compensatory damages of $80,000. The jury also returned a verdict in favor of The LaVay Corporation on the breach of fiduciary duty claim, awarding compensatory damages of $1,000 and punitive damages of $750,000. The jury returned verdicts against Gerard LaVay on all counts.

Dominion Federal filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. It moved to have the $80,000 verdict set aside because the constructive fraud claim was barred by the applicable Virginia statute of limitations, Va. Code § 8.01-248. That portion of Dominion Federal's motion was granted. Dominion Federal also moved to have the punitive portion of the verdict on the breach of fiduciary claim set aside because that claim was also untimely under Va. Code § 8.01-248. That request was denied.

Dominion Federal alternatively moved for a new trial on the breach of fiduciary duty claim because the verdict

was excessive. That part of Dominion Federal's motion was granted, with the new trial limted to damages, unless The LaVay Corporation accepted a remittitur of the punitive damages to $250,000. The remittitur was accepted. Judgment was entered against Dominion Federal in favor of The LaVay Corporation in the amount of $251,000.

After the trial, Dorn filed a motion for sanctions pursuant to FED. R. CIV. P. 11 against The LaVay Corporation and Gerard LaVay, arguing that the claims filed and maintained against him were without basis in law or fact and had been brought in violation of that rule. The district court denied the motion.

All parties appealed.[1] Insofar as relevant to the pending petition, the court of appeals (1) ruled that the district court was correct in its determination that Virginia law applied to this case; (2) reversed the district court and held that the punitive damages awarded for breach of fiduciary duty were barred by the applicable Virginia statute of limitations; (3) affirmed the dismissal of the RICO Act claims because the adverse jury verdict on the fraud claim against Dominion Federal and the directed verdict against Dorn precluded the petitioners on remand from proving the predicate acts of mail fraud or wire fraud on which their RICO Act claim was premised; (4) rejected the petitioners' attempt to appeal the remittitur order which they accepted; (5) remanded Dorn's motion for sanctions for consideration by the district court whether there was a reasonable basis for the claims made against him;[2] and (6) noted that the peti-

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[1] The petitioners did not, however, appeal the adverse verdict on the fraud claim against Dominion Federal or the directed verdict in favor of Dorn.

[2] As previously noted, the matter of sanctions has been resolved since the filing of the petition in this Court and is no longer an issue to be addressed.

tioners did not contest the ruling of the district court which set aside the $80,000 constructive fraud verdict.

REASONS FOR DENYING THE WRIT

The writ should be denied because the petition fails to present an important question of federal law which has not been previously considered and determined by this Court. All of the issues on appeal involved either the routine application of well-settled principles of federal law or issues of state law.

I. THE SUPREME COURT SHOULD NOT GRANT THE WRIT TO DETERMINE WHICH VIRGINIA STATUTE OF LIMITATIONS IS APPLICABLE TO CLAIMS OF BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE FRAUD

Dominion Federal moved the district court to reverse the constructive fraud verdict of $80,000 based on the statute of limitations. The court granted the motion based on the Virginia Supreme Court ruling in *Pigott v. Moran*, 231 Va. 76, 341 S.E.2d 179 (1986) that Virginia's one year statute of limitations, Va. Code § 8.01-248, applies to claims of constructive fraud. The court of appeals did not address this order in its decision.

Dominion Federal also moved the district court to have the punitive portion of the breach of fiduciary duty verdict reversed based on the statute of limitations. The district court denied the motion, ruling that the claim was timely under either potentially applicable statute of limitations—Va. Code § 8.01-246(3) (five years) or Va. Code § 8.01-246(4) (three years). The court of appeals reversed and held that the one year period provided in Va. Code § 8.01-248 was applicable to this claim as well, relying on the reasoning of *Pigott v. Moran, supra.*

The duty of federal courts to determine and apply state law has been settled since the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The district

court and court of appeals both followed the dictates of *Erie*. The court of appeals simply disagreed with the district court on which statute of limitations is applicable to a claim of breach of fiduciary duty. That the applicable law in Virginia on these issues is unsettled or indeed confusing does not transform the choice between a one, three or five year statute of limitations into an important question of federal law which this Court should answer. That the court of appeals reversed the district court does not affect that conclusion. This Court should decline the petitioners' request that it certify this issue to the Virginia Supreme Court or that it determine the applicable Virginia statute of limitations.

II. THE DISMISSAL OF THE PETITIONERS' RICO ACT CLAIM WAS AFFIRMED BASED ON WELL-SETTLED PRINCIPLES OF *RES JUDICATA* WHICH NEED NOT BE RE-EXAMINED BY THIS COURT

The petitioners' RICO Act claim was dismissed pretrial because the complaint failed to allege a pattern of rackteering activity. The dismissal was affirmed by the court of appeals. It concluded that the unappealed jury verdict in favor of Dominion Federal on the fraud claim and the unappealed directed verdict in favor of Dorn on all claims would preclude the petitioners on remand from proving fraud related to the subject matter of this suit based on the doctrine of *res judicata*. The petitioners therefore could not prove the mail fraud and wire fraud necessary to prevail on their RICO Act claim. This ruling obviated the need to determine whether the dismissal for failure to allege a pattern of rackteering activity was correct.[3]

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[3] Neither the district court's dismissal of the RICO Act claim nor the court of appeals' affirmance was based on the statute of limitations. The petitioners' citation to *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. ——, 107 S. Ct. 2759 (1987) is inapposite.

The court of appeals' holding relies on the routine application of the principles of *res judicata* within the confines of a single action. *See, United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). There is no important federal issue to address.

III. THE APPLICATION OF THE SUBSTANTIVE LAW OF VIRGINIA BY THE TRANSFEREE COURT WAS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

This action was transferred from the district court in Maryland to the district court in the Eastern District of Virginia. This Court held in *Van Dusen v. Barrack*, 376 U.S. 612 (1964) that, where an action is transferred pursuant to 28 U.S.C. § 1404(a) from one district in which venue is proper to another district in which venue is also proper, the transferee court must apply the law of the transferor forum to avoid improper forum shopping by the defendants.

Venue in this action was improper in the transferor forum, however, because the claims did not arise in Maryland nor did all of the defendants reside there. *See*, 28 U.S.C. § 1391(b). If the law of the transferor forum is applied by the transferee court in these circumstances, it is the plaintiffs who will have successfully engaged in improper forum shopping. Such a result would be inconsistent with the reasoning of *Van Dusen v. Barrack*. The transferee court should apply the law of the forum in which it is located. Therefore, the court of appeals affirmed the district court's application of Virginia law to the claims in this action.

The decision reached by the court of appeals in this case is consistent with the decisions of other circuits. *See, Manley v. Engram*, 755 F.2d 1463, 1467 n.10 (11th Cir. 1985); *Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir. 1984); *Nelson v. International Paint Co.*, 716 F.2d 640, 643-644 (9th Cir. 1983);

Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1110 (5th Cir. 1981); *Martin v. Stokes*, 623 F.2d 469, 472 (6th Cir. 1980). There is no need for this Court to address this issue, given the consistent rulings of the courts of appeals. This particular question of federal law is well-settled. The petitioners' suggestion that this Court should provide guidance concerning "what forum shopping is permissible," Petition at 16, should be rejected.

IV. *DONOVAN v. PENN SHIPPING* SHOULD NOT BE REVERSED

In 1977, this Court "reaffirm[ed] the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977). The petitioners accepted a remittitur of their punitive damages from $750,000 to $250,000. That they cannot now appeal from it is clear based on *Donovan v. Penn Shipping* and a hundred years of precedent. The petitioners have offered no reason to reverse this Court's longstanding rule.

V. THE PETITIONERS' ARGUMENT THAT THE COURT OF APPEALS FAILED TO ADDRESS ONE OF THEIR ARGUMENTS SHOULD HAVE BEEN PRESENTED TO THE COURT OF APPEALS

The court of appeals noted in footnote 1 of its opinion that the petitioners did not challenge the district court's order setting aside the $80,000 constructive fraud verdict. Buried at page 33 of the petitioners' brief to the court of appeals, however, was an argument that this order was erroneous. This argument was not identified in the petitioners' statement in their brief at page 9 of questions presented for review, as required by FED. R. APP. P. 28(a)(2). Moreover, the argument was included in the portion of the petitioners' brief which addressed

the separate claim for breach of fiduciary duty. It is not surprising, under these circumstances, that the court of appeals overlooked the argument.

When the court mistakenly concluded that the petitioners had not challenged this particular ruling, however, FED. R. APP. P. 40(a) authorized the filing of a petition for rehearing which "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked. . . ." This rule was adopted specifically to permit litigants to bring to the attention of the court of appeals issues which the court missed. The petitioners sought rehearing before the court of appeals but for some reason did not mention this issue in their petition. They failed to avail themselves of the remedy provided by the rules. This Court should not grant the writ solely to relieve the petitioners of the consequences of their procedural lapse.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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